NO. 80-5757

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORIGINAL COPY

FREDDIE F. DAVIS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether the Supreme Court of Georgia employed the proper procedures on remand from this Court and properly reaffirmed Petitioner's death sentence.

2.

Whether the application of Ga. Code Ann. § 27-2534.1(b)(7) was properly limited in the instant case.

3.

Whether the submission of an additional statutory aggravating circumstance to the jury on a new sentencing trial constitutes double jeopardy.

4.

Whether the jury instructions during the new sentencing trial properly explained mitigation to the jurors.

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BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Freddie Davis, was indicted in Meriwether County, Georgia, for the rape and murder of Frances Coe. Petitioner was tried by a jury and found guilty of both offenses. At the initial trial, Petitioner was sentenced to death for the offense of murder and life for rape.

On his first direct appeal to the Supreme Court of Georgia, Petitioner's convictions for murder and rape, as well as the life sentence for rape were affirmed. Davis v. Georgia, 240 Ga. 763, 243 S.E.2d 12 (1978). The Supreme Court of Georgia determined at that time that the trial court's

sentencing instructions did not fully explain to the jury that they could recommend a life sentence even though aggravating circumstances did exist and did not explain to the jury that mitigating circumstances could be considered. Thus, the Supreme Court of Georgia reversed the death penalty for the offense of murder and ordered a new trial on the issue of punishment.

A new jury was selected in Meriwether County and the State presented the same evidence as had been presented in the original trial. At this trial, the State sought the death penalty based on Ga. Code Ann. § 27-2534.1(b)(2) and (7).[1] The jury once again imposed the death penalty and found that both statutory aggravating circumstances existed beyond a reasonable doubt.

The case was again presented to the Supreme Court of Georgia on direct appeal from the resentencing hearing. The Supreme Court of Georgia considered the sentence and affirmed the trial court. Davis v. State, 242 Ga. 901, 252 S.E.2d 443 (1979). Petitioner subsequently filed a petition for a writ of certiorari in this Court. On May 27, 1980, this Court ordered that the judgment of the Georgia Supreme Court be vacated insofar as it left the death penalty undisturbed and remanded the case to the Supreme Court for further consideration in light of Godfrey v. Georgia, 446 U.S. ___, 100 S.Ct. 1759 (1980).

On remand, the Supreme Court of Georgia again affirmed Petitioner's death sentence. The Court noted that under the decisions of the Supreme Court of Georgia, the death sentence could be upheld upon the finding of the second aggravating circumstance. The Court then found that there was sufficient

1/ At the Petitioner's original trial, the State had only sought to impose the death penalty based on Ga. Code Ann. § 27-2534.1(b)(2).

evidence to support a finding beyond a reasonable doubt of the seventh aggravating circumstance. Davis v. State, 246 Ga. 432, _ S.E.2d _ (1980).[2]

Petitioner has filed the instant petition for a writ of certiorari in this Court challenging the resentencing trial conducted by the trial court as well as the decision of the Supreme Court of Georgia on remand.

2/ Petitioner's co-defendant, Eddie Spraggins, also has a petition for certiorari pending in this Court at this time. As Spraggins' case has followed a similar course as the instant case, see Spraggins v. State, 240 Ga. 759, 243 S.E.2d 20 (1978); Spraggins v. State, 243 Ga. 73, 252 S.E.2d 620 (1979); Spraggins v. State, 246 Ga. 432, _ S.E.2d _ (1980).

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I.

THE SUPREME COURT OF GEORGIA APPLIED PROPER AND CONSTITUTIONAL PROCEDURES IN CONSIDERING PETITIONER'S CASE ON REMAND FROM THIS COURT.

A. The Supreme Court Of Georgia Was Authorized To Reaffirm Petitioner's Death Sentence On Remand From This Court.

Petitioner challenges before this Court the procedures used by the Supreme Court of Georgia in conducting its review on remand from this Court. Petitioner specifically asserts that the Supreme Court of Georgia should have ordered a new jury trial on the issue of Petitioner's sentence and that the Supreme Court was not authorized to act as a de novo sentencing authority.

Petitioner's view of the decisions of this Court leading up to the instant case does not support the argument made. On the review of Petitioner's death sentence after the resentencing hearing was conducted in Meriwether County, Georgia, the Supreme Court of Georgia considered the imposition of the death penalty as required by Georgia law. Ga. Code Ann. § 27-2537. Under this provision, the Court is authorized, indeed directed, to conduct an appellate review of the sentence imposed by the trial court. The Supreme Court must determine the following:

(1) Whether the death penalty was imposed under the influence of passion, prejudice or any other arbitrary factor;

(2) Whether the evidence supports the aggravating circumstance or circumstances;

(3) Whether the death penalty is excessive or disproportionate considering the crime and the defendant.

The Court is then authorized, among other alternatives, to affirm the sentence of death. Ga. Code Ann. § 27-2537(e)(1).

This Court is presently considering the review by the Supreme Court of Georgia of the most recent death sentence imposed upon the Petitioner and the Supreme Court's decision on remand.[2] In considering the aggravating circumstances, the Court stated, "Both of the statutory aggravating circumstances are supported by the evidence." Davis, supra, 242 Ga. at 908. No detailed examination of the aggravating circumstances was shown in the opinion of the Court.

On the first petition for a writ of certiorari in this Court, the judgment of the Supreme Court of Georgia was vacated concerning the death penalty. This Court did not reverse the sentence of the trial court, but merely remanded the case for additional review by the Supreme Court of Georgia. Therefore, on remand, the Supreme Court was only conducting its appellate review under Ga. Code Ann. § 27-2537. The Court did not reimpose the death sentence, but merely reaffirmed the death penalty previously imposed by the Superior Court of Meriwether County, Georgia. Thus, instead of avoiding the issue, as alleged by Petitioner, the Supreme Court properly

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2/ References in this brief to Petitioner's sentencing and death penalty are references to the sentence imposed by the trial court during a resentencing hearing after the Supreme Court had reversed the first death penalty.

elaborated on its appellate review as authorized by Georgia law.

Petitioner further asserts that the decision by the Supreme Court of Georgia was improper because the jury did not have the benefit of the decision by this Court in Godfrey v. Georgia, 446 U.S. __,100 S.Ct. 1759 (1980), or limiting instructions. Petitioner cites a portion of the Godfrey decision referring to the fact that "A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible or inhuman.'" Godfrey, supra. Petitioner omits the fact that one of the key distinctions in the instant case and in the case of Godfrey, is the actual aggravating circumstance found by the jury. In Godfrey, the jury only found that the offense of murder was outrageously or wantonly vile, horrible or inhuman. Godfrey, supra at 1764. All through the Godfrey case, the prosecutor stated that there was no allegation of torture or an aggravated battery. Furthermore, the report of the trial judge specifically stated that the victim had not been physically harmed or tortured. In the case at bar, the jury found "the offense of murder was committed while the offender was engaged in the commission of an additional capital felony, to-wit: the rape of Frances Coe. The offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind on the part of the defendant, or an aggravated battery to the victim." (R. 23). Thus, in relation to the seventh aggravating circumstance, the jury in the Godfrey case only found the first portion of the code provision, whereas, in the present case, the jury found the entire aggravating circumstance. The finding

by the jury of torture, depravity of mind or aggravated battery is a specific verdict showing restraint on the arbitrary and capricious infliction of the death penalty.

Petitioner asserts that the decision by the Supreme Court of Georgia amounts to speculation that the jury had a constitutional rather than an unconstitutional basis for its decision, citing several cases from this Court, including Stromberg v. California, 283 U.S. 359 (1931). In Stromberg, a general verdict of guilty had been returned. The lower court ruled that although a part of the statute and the jury's charge might be unconstitutional, the verdict could still stand. This Court found that it could not be determined on the face of the record that the Petitioner had not been convicted under an invalid clause, particularly in light of the instructions of the jury. In the instant case, no finding has ever been made that Ga. Code Ann. § 27-2534.1(b)(7) is unconstitutional on its face. When the statute is considered, and found by the jury, as a whole, there is no unconstitutional alternative available. There was no speculation by the Georgia court as to the basis of the jury's finding. The Court performed its statutory duty and determined that the evidence supported the finding of both aggravating circumstances.

Clearly, the Supreme Court of Georgia on remand considered the Petitioner's case "As it was tried and as the issues were determined in the trial court." Cole v. Arkansas, 333 U.S. 196, 201 (1948). Respondent submits that the Supreme Court of Georgia acted within its statutory authority and properly reaffirmed Petitioner's death sentence without ordering a new jury trial on sentencing.

B. The Supreme Court Of Georgia Acted Within Its Authority In Reconsidering Petitioner's Death Sentence Without Receiving Additional Briefs Or Oral Argument from Either Party.

Petitioner asserts that after remand, the Supreme Court of Georgia should have granted his request to file briefs and have oral argument before any additional decision was made. Petitioner also asserts various rights he would have had on remand to the trial court had the Supreme Court chosen to send the case back for a resentencing hearing. The fact remains that Petitioner's case was not remanded to the trial court, but to the Georgia Supreme Court. Clearly, the filing of additional briefs and having additional oral argument would be within the discretion of that Court.

The review conducted by the Georgia Supreme Court was not a resentencing proceeding, but a more detailed review of the death penalty as imposed by the trial court. The Court did nothing more than reconsider its own judgment in light of an intervening decision by this Court. The Petitioner had the automatic review provided by the Georgia statute and had the opportunity to file briefs and have oral argument prior to any decision being made by the Supreme Court. There was no deprivation of a right to a hearing by the Supreme Court's consideration on remand, as Petitioner had previously had a hearing before that Court and had the opportunity to argue concerning the sentencing of the Petitioner. No new evidence existed on remand and no new laws had been enacted for the Court to consider. This Court had only rendered a decision concerning the appellate review of death penalty cases under the seventh

aggravating circumstance. Petitioner again likens the actions of the Supreme Court of Georgia to those of a sentencing authority, but as emphasized by Petitioner, the Court has no authority to impose the death sentence. The Supreme Court only reaffirmed the sentence previously imposed. Questions of briefs and arguments and when additional briefs may be filed are clearly within the province of the rules of the Supreme Court of Georgia and do not rise to the level of a federal question for review by this Court.

C. Even Should This Court Reverse The Seventh Aggravating Circumstance, The Existence Of An Additional Aggravating Circumstance Allows The Sentence To Remain Intact.

The seventh aggravating circumstance is clearly supported by the evidence, but Petitioner still contends that if it is not, the existence of an additional aggravating circumstance does not preserve the death sentence. Respondent submits that the existence of two aggravating circumstances clearly shows that there is no basis for a granting of certiorari.

As previously noted, Petitioner was sentenced to death after a finding by the jury of the statutory aggravating circumstances found in Ga. Code Ann. § 27-2534.1(b)(2) and (7). This Court initially remanded the case in light of its decision in Godfrey, supra, dealing with the seventh aggravating circumstance. On remand, the Supreme Court noted in a footnote that under its decisions, the instant case could be upheld solely on the existence of the second aggravating circumstance. Davis, supra, 246 Ga. at 432.

The law in Georgia is clear on this issue. The Supreme Court of Georgia has held on several occasions that even if the finding of some aggravating circumstances must be set aside, the death penalty will be upheld if one remaining aggravating circumstance exists. Dampier v. State, addendum, 245 Ga. 882, _S.E.2d_ (1980); Burger v. State, 245 Ga. 458, 460-61, 265 S.E.2d 797, cert. denied _U.S._, 100 S.Ct. 2975, rehng. denied, _U.S._, 101 S.Ct. 31 (1980); Gates v. State, 244 Ga. 587, 599, 261 S.E.2d 349 (1979), cert. denied _U.S._, 100 S.Ct. 1332 (1980).Furthermore, in denying certiorari in an additional Georgia death penalty case, Justice Stevens noted,

> "The Georgia Supreme Court. . . decided to adhere to its prior position that a death penalty imposed on the basis of a plurality of aggravating circumstances, each of which has been established beyond a reasonable doubt, will not be set aside simply because one of the aggravating circumstances is vulnerable. . . . The Georgia Supreme Court's position is clear, and . . . I consider it consistent with this Court's decisions."

Westbrook v. Balkcom, __U.S.__, 49 U.S.L.W. 3337 (Nov. 18, 1980) (Stevens, J., concurring). Thus, it is clear what the law in the State of Georgia is as to additional aggravating circumstances.

Respondent thus submits that the remands by this Court do not indicate that a reversal is required when one aggravating circumstance is found to not be supported by the evidence.

Contrary to Petitioner's assertion, this does not present a judgment with an ambiguity as to whether the basis is unconstitutional. Clearly, there is still a constitutional basis for the decision. The elimination of one aggravating circumstance has no effect on the evidence considered by the jury as the jury can consider all facts and circumstances presented at trial in mitigation and aggravation. Even had the jury not been instructed on the seventh aggravating circumstance, it would still know of the nature and extent of the wounds inflicted on the victim.

Petitioner has referred to a decision by the Supreme Court of North Carolina in which an allegedly contrary decision was reached. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979). In Cherry, the jury had determined that the defendant was guilty of felony murder. The trial court had then instructed the jury as to aggravating circumstances and had included the underlying felony as one of the aggravating circumstances that could be used to find the death penalty. The Court determined that when felony murder was found by the jury, the underlying felony could not be considered as an aggravating circumstance. The Court thus concluded that the trial judge erred in even submitting that circumstance to the jury for consideration. In the instant case, there has never been any contention that there was an error in submitting the aggravating circumstance to the jury for its consideration. The main contention has been that the jury's finding was not supported by the evidence. Although Petitioner has vigorously attacked the seventh aggravating circumstance, it has not been found to be unconstitutional at any time. Thus, in light of the evidence presented at trial which indicates torture and aggravated battery, the Court properly

charged the jury on the seventh aggravating circumstance. Thus, unlike the case in Cherry, the jury in the instant case did not have an aggravating circumstance presented to it that was inappropriate for its consideration.

Petitioner also cites to Hicks v. Oklahoma, _U.S._, 100 S.Ct. 2227 (1980), and asserts that this decision shows a violation of fundamental fairness if an additional aggravating circumstance is used to uphold the death penalty. In Hicks, the jury was instructed as to the sentence it was to return based on the habitual offender act then existing in Oklahoma. That particular act was later found to be unconstitutional by the Oklahoma courts. This Court found that the theory that the jury might have still imposed such a sentence because it was in the range of permissible sentences, was too speculative, particularly because under the correct instructions, the jury could impose a minimum of ten years in prison. The instant case is not one in which the jury was told what sentence to impose, nor is it a case in which the jury was improperly instructed. The facts considered by the jury would still be present.

Petitioner makes one final assertion in this regard claiming that the Supreme Court of Georgia reimposed the death penalty relying upon the second aggravating circumstance, that is, that the murder was committed during the commission of another felony, to-wit, rape. Petitioner asserts that this raises a serious question under Coker v. Georgia, 433 U.S. 603 (1977). This allegation is clearly without merit for more than one reason. First of all, the Supreme Court of Georgia did not reimpose the death penalty and did not rely solely on the second aggravating circumstance.

The Supreme Court of Georgia reaffirmed the trial court's finding of the death penalty and merely mentioned that the death penalty could be upheld based on the existence of the additional aggravating circumstance. Secondly, Petitioner's reference to Coker v. Georgia, apparently is alluding to the fact that this Court in Coker ruled that the imposition of the death penalty for the rape of an adult woman was excessive and disproportionate. This Court has never held that a rape cannot be used to serve as an aggravating circumstance to impose the death penalty for murder. In fact, this Court in Coker even noted in a footnote that the Supreme Court of Georgia continues to recognize armed robbery and other specific felonies as capital offenses for the purposes of applying the aggravating circumstance provision of the Georgia Code. Coker, supra at 600, fn. 15. There is clearly no error in using a rape to serve as an aggravating circumstance to justify the imposition of the death penalty for murder.

Respondent asserts that even if the seventh aggravating circumstance were improperly found in the instant case, the existence of an additional aggravating circumstance is sufficient to support the death penalty.

II.

THE SUPREME COURT OF GEORGIA APPLIED GA. CODE ANN. § 27-2534.1(b)(7) IN A CONSTITUTIONAL MANNER IN THE INSTANT CASE.

Petitioner has asserted that the Supreme Court of Georgia has unconstitutionally applied the seventh aggravating circumstance in the instant case by its decision on remand. Respondent asserts that the facts of this case clearly show that the seventh aggravating circumstance is appropriate in the instant case and that the Supreme Court of Georgia properly considered the statute on remand.

Petitioner has asserted that the Supreme Court of Georgia has chosen to interpret the decision of this Court in Godfrey narrowly, and has not followed the teachings of this Court. Petitioner specifically refers to a "rash of affirmances" occurring since the decision of this Court in Godfrey, and states that a number of them are "highly questionable". (Brief of Petitioner at 19). Petitioner has not shown how any of these affirmances were made on questionable grounds. In reality, since this Court's decision in Godfrey, the Supreme Court of Georgia has taken great pains to make its appellate review an elaborate and detailed process by examining each case and the facts of each case very thoroughly.

This Court should particularly note that the Supreme Court of Georgia recently in Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980), went into great detail in defining and explaining the seventh aggravating circumstance. The Court consolidated its earlier opinions and this Court's decision in Godfrey to set out a specific meaning of the the seventh aggravating circumstance for the purposes of appellate review.

In considering Petitioner's death sentence on remand in light of Godfrey, this Court found that the murder in the instant case was clearly distinguishable from those murders for which the death penalty is not appropriate. The Court did specifically contrast the facts in this case from those in Godfrey to show the extreme nature of this crime in comparison to that in Godfrey. In the instant case, the Supreme Court of Georgia noted that death was not instantaneous and that this was not a domestic type of situation. The Court further noted that the evidence showed that the victim had been raped and killed as part of a robbery scheme. "The victim died from loss of blood. She had been beaten about the face and had been repeatedly stabbed, slashed and cut. Her throat was cut and the trachea was almost severed. She had been partially disembowelled. Death was not instantaneous but was prolonged." Davis, supra, 246 Ga. at 433; Spraggins v. State, 240 Ga. 759, 243 S.E.2d 20 (1978). The Court went on to note the evidence indicating that there had been a rape of the victim. The Court then found that the jury was authorized to find, consistently with this Court's holding in Godfrey "that beyond a reasonable doubt, the murder of the victim was of the type universally condemned by civilized society as 'outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind.'" Davis, 246 Ga. at 434.

Clearly under these facts, the application of the seventh aggravating circumstance is appropriate. The Supreme Court of Georgia thoroughly conducted its review on remand in accordance with this Court's holdings in Godfrey and properly determined that the jury had correctly found the existence of the seventh aggravating circumstance beyond a reasonable doubt.

III.

THE ADDITION OF A NEW AGGRAVATING CIRCUMSTANCE ON PETITIONER'S SECOND SENTENCING TRIAL IN MERIWETHER COUNTY DID NOT AMOUNT TO DOUBLE JEOPARDY.

After Petitioner's death sentence was reversed by the Supreme Court of Georgia on his first direct appeal, Petitioner was returned to the Superior Court of Meriwether County for a new trial on sentencing. In the first trial, the District Attorney submitted for the jurors' consideration, the statutory aggravating circumstance that the murder was committed while the Petitioner was engaged in the commission of another capital felony, that being rape. Ga. Code Ann. § 27-2534.1(b). At the resentencing trial, the seventh statutory aggravating circumstance was also included for the jurors' consideration. Petitioner argues that this constitutes double jeopardy and that the State should be precluded from adding an additional aggravating circumstance at a subsequent trial for resentencing. Petitioner also attempts to assert that this is in some manner a vindictive action on the part of the State.

This point was addressed by the Supreme Court of Georgia on its review after the resentencing hearing. The Court found that there was no double jeopardy violation in submitting an additional aggravating circumstance for the jury's consideration at the resentencing trial. The Court cited its prior decision in Redd v. State, 242 Ga. 876, 252 S.E.2d 383 (1979). In Redd, the Supreme Court of Georgia noted that the double jeopardy clauses of both the federal and state constitutions state that no person shall be placed in

jeopardy of life or liberty more than once for the same offense. Code Ann. § 1-805; Ga. Code Ann. § 2-115. "The prohibition is not against being twice punished, but against being twice put in jeopardy". United States v. Ball, 163 U.S. 662, 669 (1896). This Court has also held that the double jeopardy clause of the Fifth Amendment is written in terms of the potential risk of trial and conviction not of punishment. Price v. Georgia, 398 U.S. 323, 326 (1970).

In the decision in Redd, supra, the Supreme Court of Georgia noted that the defendant in that case, as the Petitioner in the instant case, had his conviction affirmed on appeal. The Court further noted that statutory aggravating circumstances are not offenses, but are charged to a jury to assist the jury in deciding whether to impose a life sentence or a death sentence. Redd, supra at 883. It was further noted in the concurring opinion to Redd, that the addition of the statutory aggravating circumstance did not put the jury in a position of having to compromise. As the jury could only impose either a death sentence or a life sentence, there was no compromise available to the jury.

It cannot be said that the submission of a second aggravating circumstance at the resentencing trial was to have a chilling effect as a result of the Petitioner having earlier exercised his appellate rights. The Petitioner in the State of Georgia in a death penalty case is entitled as a matter of law to an automatic appeal from any conviction in which he receives the death penalty. Ga. Code Ann. § 27-2537(a). Furthermore, it could hardly be considered a chilling effect as the punishment that the jury could impose

was no greater than the punishment received by the Petitioner at his first trial.

There is also no evidence to indicate that the District Attorney's action in submitting an additional statutory aggravating circumstance constituted vindictiveness. See North Carolina v. Pearce, 395 U.S. 711 (1969). The Petitioner did not receive a greater sentence on retrial, but received the same sentence he had earlier received. Thus, his retrial did not subject him to a greater punishment than that imposed at his first trial. Furthermore, because the jurors were not called upon to consider the additional statutory aggravating circumstance in the first trial, the submission of the additional circumstance on the second trial does not constitute double jeopardy. See Price v. Georgia, supra; Bordenkircher v. Hayes, 434 U.S. 357 (1978).

Petitioner has attempted to imply that evidence was introduced at the second sentencing hearing which would not have been introduced had the seventh aggravating circumstance not been added. This ignores the fact that under Georgia law, all evidence introduced at trial may be considered in aggravation or in mitigation of punishment. Thus, all evidence that had been admitted at the trial, including the evidence relating to the nature and extent of the victim's injuries, was admissible at the sentencing hearing.

Respondent asserts that the addition of an aggravating circumstance did not constitute double jeopardy as no additional evidence was introduced and as the jury had not previously had the chance to make a determination as to that aggravating circumstance. Furthermore, no vindictiveness

is shown because the Petitioner could only have received the same sentence as he received at his first trial or a lesser one. The addition of an aggravating circumstance does not increase the possible punishment. Thus, Respondent submits that no federal question is presented by this allegation.

IV.

THE INSTRUCTIONS GIVEN TO THE JURY AT PETITIONER'S RESENTENCING HEARING CLEARLY FALL WITHIN THE CONSTITUTIONAL GUIDELINES SET FORTH BY THIS COURT.

Petitioner has enumerated several allegations relating to the charge of the trial court at his resentencing hearing. All of these allegations will be dealt with under this heading by the Respondent.

The Petitioner's first death sentence was specifically set aside because the trial judge failed to inform the jurors that even if they found the existence of a statutory aggravating circumstance, they could impose a life sentence, and further, because the jury had not been instructed that they could consider mitigating circumstances in determining whether or not to impose the death penalty. Davis, supra, 240 Ga. at 767. On the resentencing hearing, the trial court charged, "It is now your duty to determine within the limits prescribed by law the penalty that shall be imposed for that offense." (ST. 353).[3] The Court then charged the jury that they were authorized to consider all of the evidence received in open court. (ST. 354). The Court further charged that the jury was authorized to consider all the facts and circumstances of the case. (ST. 355).

3/ ST. refers to the transcript of Petitioner's resentencing trial.

The Court then charged as follows:

"Ladies and Gentlemen of the jury, in reaching your verdict, you are authorized to consider all of the facts and circumstances, if you find there be any, in mitigation of punishment. In determining whether mitigating circumstances exist, you are authorized to consider all of the evidence produced by the State and the defendant throughout this trial.

Mitigating circumstances are those circumstances which do not constitute a justification or excuse for the crime, but which may be considered as extenuating or reducing the moraIe [sic], culpability or blame.

In reaching this verdict, you are not required to find mitigating circumstances in order to recommend a sentence of life imprisonment. You may recommend a sentence of life imprisonment regardless of whether or not you believe mitigating circumstances exist in this case.

Ladies and Gentlemen of the jury, I charge you that before you would be authorized to find a verdict fixing a sentence of death by electrocution, you must find evidence of statutory aggravating circumstances as I will define to you later

in this charge, sufficient to authorize the supreme penalty of law."

(ST. 355-6).

The Court then proceeded to charge the jury on aggravating circumstances. The Court further charged:

> "The law provides that when a party is tried by a jury, and is convicted of an offense that may be punishable by death, the sentence of death shall not be imposed, unless the jury's verdict includes the finding of at least one aggravating statutory circumstance and a recommendation that the death sentence be imposed. When a statutory aggravating circumstance is found and a recommendation of death is made, the Court shall sentence the defendant to death."

(ST. 356). The State then proceeded to explain the different aggravating circumstances that were available to the jury for its consideration in this case.

The Petitioner's first allegation concerning this charge is that the jury was not told that its decision must include a focus on the particular characteristics of the Petitioner. Petitioner asserts this conflicts with this Court's decisions in Gregg v. Georgia, 428 U.S. 153 (1976), Woodson v. North Carolina, 428 U.S. 280 (1976) and others. In Jurek v. Texas, 428 U.S. 262 (1976), this Court found that a jury must be allowed to consider why the death penalty should be imposed or why it should not be imposed.

The Court went on to cite its decision in Gregg, supra.

> "In Gregg v. Georgia, we today hold constitutionally valid a capital-sentencing system that directs the jury to consider any mitigating factors and in Proffitt v. Florida, we likewise hold constitutional a system that directs the judge and advisory jury to consider certain enumerated mitigating circumstances."

Id. at 271-2. The Court noted that under Texas law, the jury may be asked to consider whatever evidence of mitigating circumstances the defense could bring before it. The Court then went on to state that the Texas statute as those in Georgia and Florida did have procedural guidelines and did focus the jury's objective consideration to the circumstances of the offense and the offender. The Court went on to note that "What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." Jurek at 276. The Court found that the Texas statute authorized the defendant to bring whatever information he could relating to mitigating circumstances before the jury and that this guaranteed that the jury would have adequate guidance to perform its sentencing function.

At no time has this Court specifically required that mitigating circumstances be enumerated or that a jury be specifically told that it must consider all characteristics of an individual defendant or of the crime. No precise words have been set forth by this Court as being mandatory in this matter. Clearly, the instructions given by the trial court to the jury authorized them to consider anything that might be presented to them that they would consider mitigating. This is clearly sufficient under the rulings of this Court.

Petitioner further urges that the term mitigating was not sufficiently defined for the jury and that the Court did not provide any examples for the jury. Respondent asserts that no decisions by this Court have required a more thorough definition of mitigation, nor have they required particular mitigating factors to be set forth for the jury by the Court.

The Supreme Court of Georgia has considered this allegation on several occasions and found that mitigating circumstances are not required to be singled out under Georgia law, referring to Ga. Code Ann. § 26-3102. "Mitigating circumstances are not a predicate for a recommendation of a life sentence, though statutory aggravating circumstances are required for a death sentence." Thomas v. State, 240 Ga. 393, 401, 242 S.E.2d 1 (1977). In Spivey v. State, 241 Ga. 477, 479, 246 S.E.2d 288 (1978), the Supreme Court of Georgia held,

> "The reason behind the ruling was that Georgia law no where defines mitigating circumstances. 'Mitigating circumstances' are referred to in Code Ann. § 26-2534.1(b) and § 26-2503, but the statutes are wholly silent on what they shall be . . . . The conclusion is inescapable that the legislature meant to empower the jury to consider as mitigating anything they found to be mitigating without limitation or definition. This is a constitutionally valid procedure. Thus, the instant

case clearly falls within those prior decisions of the Supreme Court of Georgia and clearly follows Georgia law in not referring to any specific mitigating circumstances and in not giving a more elaborate definition of mitigation."

The trial court's instruction on mitigation in the instant case was clearly sufficient. The term mitigating circumstances was defined and thus, no further elaboration was required because the word mitigating is a common term within a juror's understanding. See United States v. Beasley, 519 F.2d 233 (5th Cir. 1975), rehng. denied, 522 F.2d 1280 (5th Cir. 1976).

Petitioner also asserts that the jury was not informed that it should weigh mitigating circumstances against aggravating circumstances. Petitioner specifically refers to the decision in Jurek v. Texas, supra.

Jurek v. Texas required such an instruction because the statutory scheme in Texas required the jury to answer questions concerning whether the mitigating circumstances outweighed the aggravating circumstances. Under the Georgia statutory scheme, mitigating circumstances do not have to outweigh aggravating circumstances. The jury may determine that a life sentence should be imposed without ever finding any mitigation whatsoever. Clearly, under the Georgia sentencing scheme and under the constitutional guidelines of this Court, no such specific instruction was required.

Respondent asserts that the instructions by the trial court fully explained mitigating circumstances to the jury. The jury was instructed to consider anything in mitigation and that they could vote to impose a life sentence even without mitigating circumstances. Thus, the instructions by the Court at Petitioner's second sentencing hearing were proper.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Freddie F. Davis.

Respectfully submitted,

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